

Newsletter, 16 June 2023

EU Commission has adopted revised Horizontal Block Exemption Regulations and Horizontal Guidelines

On 1 July 2023, the EU Commission's revised Horizontal Block Exemption Regulations (HBERs) on Research and Development and Specialisation Agreements will enter into force, accompanied by revised Horizontal Guidelines

The EU Commission has adopted its long-awaited revised HBERs on Research and Development (R&D) and Specialisation. In addition, the Commission published revised Horizontal Guidelines with further guidance on the assessment of cooperation agreements, for the first time including a chapter on sustainability agreements.

Background on the HBERs and Horizontal Guidelines

The cartel prohibition of Art. 101(1) TFEU prohibits agreements between companies that restrict competition. This does not mean that undertakings must not enter into horizontal cooperation agreements at all. Quite in contrast, many of these cooperation agreements have pro-competitive effects and can contribute to improving the production or distribution of goods or to promoting technical or economic progress.

To facilitate the assessment whether certain cooperation agreements are compliant with competition law, the Commission has adopted the HBERs which automatically exempt R&D¹ and specialisation agreements² that meet certain conditions from the cartel prohibition, thus creating a safe harbour for those agreements. The Horizontal Guidelines³ provide further guidance on how to: (i) apply the HBERs; (ii) assess R&D and specialisation agreements that fall outside the HBER's safe harbour; and (iii) assess other common types of horizontal cooperation such as joint purchasing agreements or information exchange. In 2021, the

Commission had started an evaluation and consultation process concerning the previous HBERs that will expire on 30 June 2023. With its revisions, the Commission intends to adapt the HBERs and Horizontal Guidelines to the economic and societal developments of the last ten years, such as digitisation and the pursuit of sustainability goals, and to the latest case law.⁴

Main changes in the R&D BER

The new R&D BER provides additional guidance for the **calculation of market shares**⁵. In particular, the revised rules give more prominence to the **protection of innovation competition**, i.e., when companies are not competitors for existing products or technologies but nevertheless push each other to compete on innovation regarding new markets, and where it is often not possible to calculate market shares.⁶ In this context, the R&D BER emphasizes the Commission's **powers to withdraw the benefit of the exemption** in individual cases.⁷

Main changes in the Specialisation BER

The revised rules expand the scope of the Specialisation BER to **cover more types of production agreements** concluded by more than two parties.⁸ Identical to the R&D BER, the Specialisation BER introduces a more flexible approach for the **calculation of the market shares**.⁹ Chapter 3 on specialisation agreements in the revised Horizontal Guidelines now include clarifications regarding horizontal subcontracting agreements.¹⁰

¹ Commission [Regulation](#) on the application of Art.101(3) TFEU to certain categories of research and development agreements ("R&D BER").

² Commission [Regulation](#) on the application of Art. 101(3) TFEU to certain categories of specialisation agreements ("Specialization BER").

³ [Guidelines](#) on the applicability of Art. 101 TFEU to horizontal cooperation agreements ("Horizontal Guidelines").

⁴ [Explanatory Note](#) on the main changes proposed for the HBERs and Horizontal Guidelines, para. 6.

⁵ Art. 7 R&D BER.

⁶ Art. 6(2) R&D BER, Horizontal Guidelines, para. 98 et seq., 122 et seq.

⁷ Art. 10(2) lit. e R&D BER.

⁸ Art. 1 (1) No. 1 lit a. Specialisation BER.

⁹ Art. 4 Specialisation BER.

¹⁰ Horizontal Guidelines para. 175.

Main changes in the Horizontal Guidelines

The revised Guidelines contain, *inter alia*:

- New **Introductory Chapter** reflecting the latest EU case law on various basic concepts and definitions regarding Art. 101(1) TFEU and providing guidance on, *inter alia*, agreements between joint ventures and their parents¹¹;
- **New explanatory sections** how to apply the R&D and Specialisation BER¹²;
- Revised chapter 4 on **Purchasing Agreements** explaining the distinction between joint purchasing and buyer cartels¹³, possible anti-competitive effects on the upstream supply side¹⁴, and certain joint negotiating tactics¹⁵;
- Expanded chapter 5 concerning **Commercialization Agreements**, including a specific section on bidding consortia¹⁶;
- Newly structured chapter 6 on **Information Exchange** with additional guidance on, *inter alia*, the concept of commercially sensitive information¹⁷ and different types of information exchange and data sharing¹⁸;
- Amended chapters 7 and 8 on **Standardisation Agreements** with clarifications regarding open participation in the standard-setting process¹⁹ and disclosure requirements concerning IP rights²⁰;
- For the first time: an individual chapter 9 on **Sustainability Agreements** including a broad definition and examples of sustainability agreements that are exempt from the prohibition of Art. 101(1) TFEU; guidance on the assessment of such agreements and types of consumer benefits that can be taken into account in this assessment²¹.

Comment

The new HBERs provide for more clarity and their application in practice will be easier. The amended definition of ‘unilateral specialisation agreements’ in the Specialisation BER is particularly relevant for small- and medium-sized undertakings with limited resources, for which an effective specialisation may require the cooperation of more than two parties.

Practitioners will be relieved that the new R&D BER maintains its traditional market share test

¹¹ Horizontal Guidelines para. 12 et seq.

¹² Horizontal Guidelines, para. 51 et seq., para. 180 et seq.

¹³ Horizontal Guidelines para. 279 et seq.

¹⁴ Horizontal Guidelines para. 294 et seq.

¹⁵ Horizontal Guidelines para. 303 et seq.

¹⁶ Horizontal Guidelines, Chap. 5.4, para. 347 et seq.

as opposed to the draft R&D BER’s suggestion to limit, in situations of “innovation competition”, the exemption only to cases where three independent competing R&D projects of third parties exist concerning the same new products or technologies or pursuing substantially identical R&D poles.

The Horizontal Guidelines’ new clarifications and easier self-assessment regarding information exchange will be helpful in practice. Also, companies will welcome the clearer distinction between joint purchasing agreements and buyer cartels. As seen during the gas crisis, joint purchasing is an important way for companies to cooperate in times of crisis.

The most notable addition to the Horizontal Guidelines, though, is the new chapter on sustainability agreements. Whereas this chapter clearly shows the Commission’s priorities and efforts regarding a greener and more sustainable competition law, the Guidelines, despite intense discussion after their draft was released in March 2022, still include high hurdles for exemptions of such sustainability agreements, in particular due to the definition of individual and collective benefits that need to be derived from these agreements. The Commission again reminds companies that they can request informal guidance on compliance with EU competition rules in this regard.



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¹⁷ Horizontal Guidelines, para. 384 et seq.

¹⁸ Horizontal Guidelines, para. 395 et seq.

¹⁹ Horizontal Guidelines, para. 465, 466.

²⁰ Horizontal Guidelines, para. 457, 474 et seq.

²¹ Horizontal Guidelines, para. 556 et seq.